

No. 87-736

Supreme Court, U.S.

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In The  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

Honorable BERTRAM R. GELFAND,  
Surrogate, Bronx County,

*Petitioner,*

v.

NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF APPEALS OF THE STATE OF NEW YORK

**BRIEF OF RESPONDENT IN OPPOSITION**

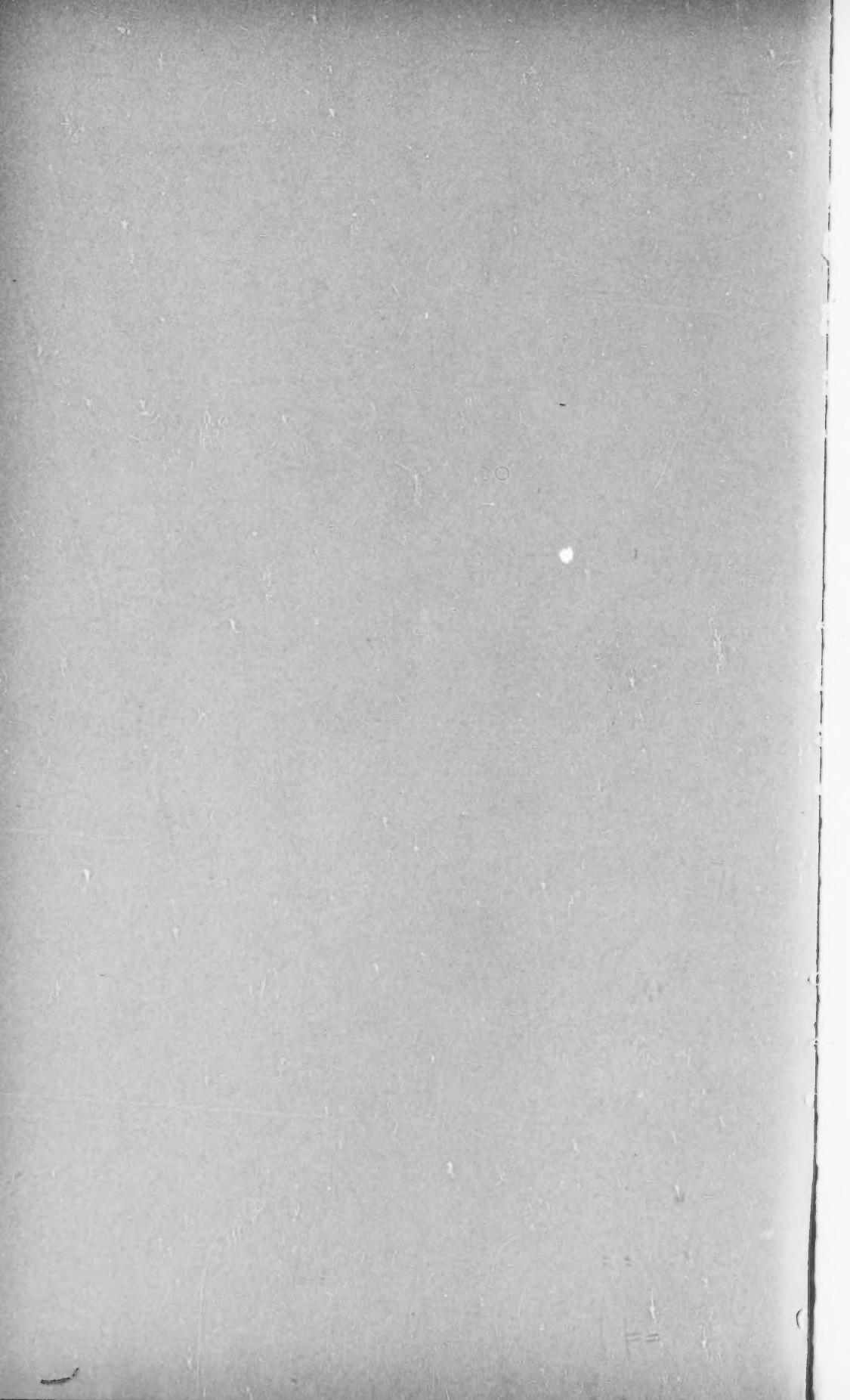
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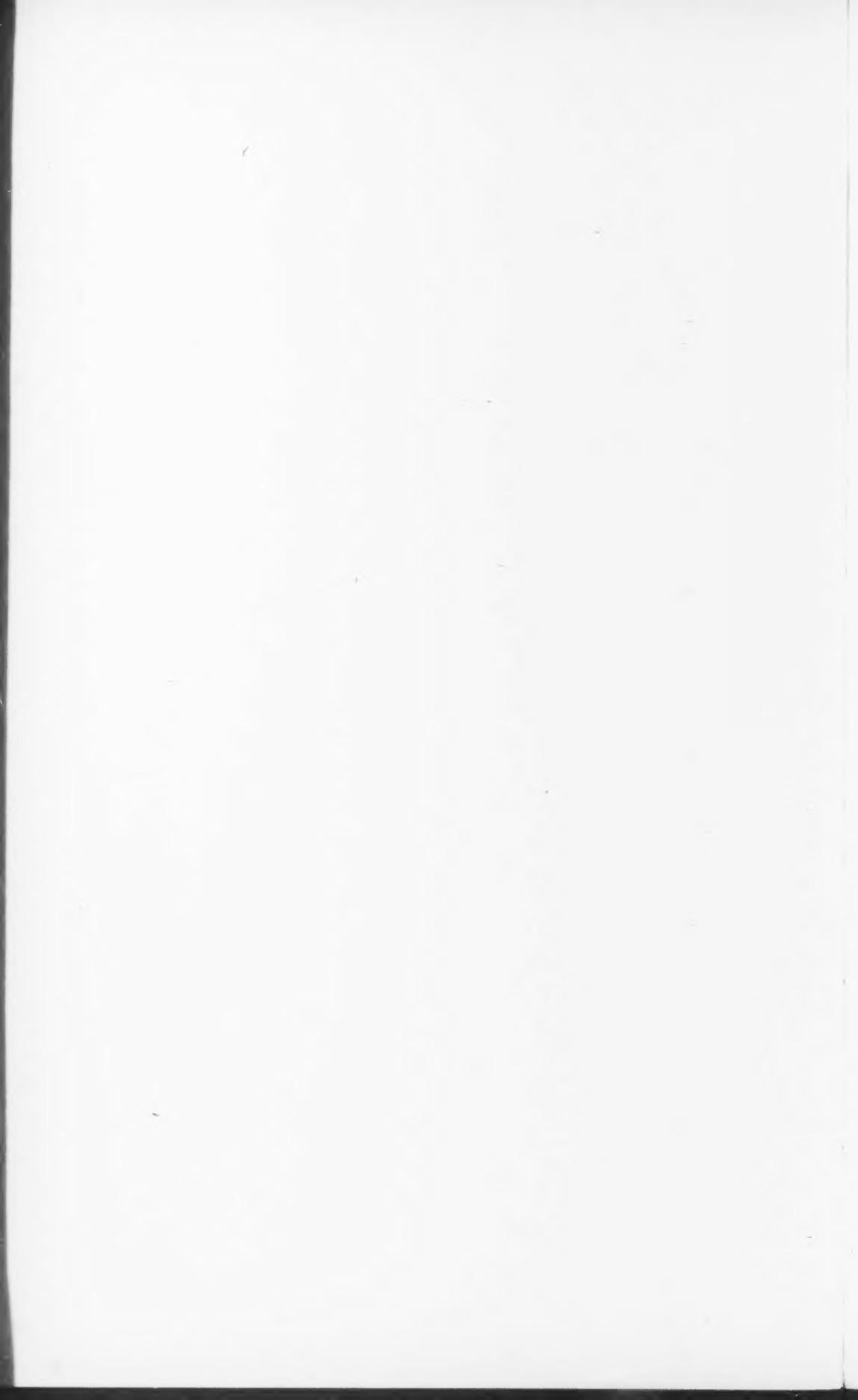
November 12, 1987

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Question Presented

Where petitioner was removed from judicial office by the New York State Court of Appeals upon stated charges, did it violate his right to due process for the Court to have commented in its opinion on material in the record relevant to but not precisely verbalized in the charges?



## TABLE OF CONTENTS

	<u>Page</u>
Opinion Below.....	2
United States Constitutional Provisions Involved.....	3
New York State Constitutional Provisions Involved.....	3
New York Statutes Involved.....	5
Question Presented.....	8
Statement of the Case.....	9
 <b>Argument</b>	
I. The Petition Fails To Demonstrate That Peti- tioner's Due Process Rights Were Violated, In That Petitioner Had Clear And Ample Notice Of The Charges Against Him And Was Removed From Office On Those Charges.....	11
Conclusion.....	18

## Citations

### Cases:

Matter of Gelfand v. State Commission on Judicial Conduct, 70 NY2d 211 (1987).....	9,10
--	------

Page

<u>Cleveland Board of Education v. Loudermill,</u> 470 US 532 (1985) .....	13,16
<u>Memphis Light, Gas &amp; Water Division v. Craft,</u> 436 US 1 (1978) .....	13,16
<u>Mullane v. Central Hanover Bank &amp; Trust Co.,</u> 399 US 306 (1950) .....	13-14,16

<u>In re Ruffalo,</u> 390 US 544 (1968) .....	18
--	----

United States Constitutional Provisions:

The Due Process Clause of the Fourteenth Amendment.....	3
--	---

The Equal Protection Clause of the Fourteenth Amendment.....	3
---	---

New York State Constitutional Provisions:

Article 6, Section 22(a).....	3
Article 6, Section 22(d).....	4,10

New York Statutes:

Judiciary Law Section 44(4).....	5,9
Judiciary Law Section 44(7).....	6,9
Judiciary Law Section 44(9).....	8,10

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SUPREME COURT OF THE UNITED STATES  
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Honorable BERTRAM R. GELFAND,  
Surrogate, Bronx County,

Petitioner,

v.

New York State Commission  
on Judicial Conduct,

Respondent.

---

On Petition for a Writ of  
Certiorari to the Court of Appeals  
of the State of New York

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BRIEF FOR RESPONDENT IN OPPOSITION

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Respondent New York State  
Commission on Judicial Conduct  
("Commission") prays that the Petition of  
Bertram R. Gelfand for a Writ of  
Certiorari be denied.

Opinion Below

The opinion of the Court to which petitioner requests that a Writ of Certiorari be directed, is reported at 70 NY2d 211 and is reproduced in the appendix to the petition (Pet. App. 37-46).<sup>1</sup> The opinion of the Court of Appeals to remove petitioner from the office of Surrogate was based upon review of the record of an unreported determination of the Commission, which is also reproduced in the appendix to the petition (Pet. App. 6-36). The Commission's determination was based upon the record of a hearing and proceedings pursuant to stated charges served upon petitioner in a Formal Written Complaint, which is also

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<sup>1</sup> References to "Pet." are to pages of the petition. References to "Pet. App." are to pages of the appendix to the petition.

reproduced in the appendix to the petition (Pet. App. 1-5).

United States Constitutional Provisions Involved

The Due Process Clause of the Fourteenth Amendment to the United States Constitution states:

[No state] shall deprive any person of life, liberty, or property, without due process of law.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution states:

...nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws.

New York State Constitutional Provisions Involved

Article 6, Section 22(a) of the New York State Constitution states:

There shall be a commission on judicial conduct. The commission on judicial conduct shall receive, initiate,

investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system, in the manner provided by law; and, in accordance with subdivision d of this section, may determine that a judge or justice be admonished, censured or removed from office for cause, including, but not limited to, misconduct in office, persistent failure to perform his duties, habitual intemperance, and conduct, on or off the bench, prejudicial to the administration of justice, or that a judge or justice be retired for mental or physical disability preventing the proper performance of his judicial duties. The commission shall transmit any such determination to the chief judge of the court of appeals who shall cause written notice of such determination to be given to the judge or justice involved. Such judge or justice may either accept the commission's determination or make written request to the chief judge, within thirty days after receipt of such notice, for a review of such determination by the court of appeals.

Article 6, Section 22(d) of the New York State Constitution states:

In reviewing a determination of the commission on judicial conduct, the court of appeals may admonish, censure, remove or retire, for the reasons set forth in subdivision a of this section, any judge of the unified court system. In reviewing a determination of the commission on

judicial conduct, the court of appeals shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based. The court of appeals may impose a less or more severe sanction prescribed by this section than the one determined by the commission, or impose no sanction.

New York Statutes Involved

New York Judiciary Law Section

44(4) states:

If in the course of an investigation, the commission determines that a hearing is warranted it shall direct that a formal written complaint signed and verified by the administrator be drawn and served upon the judge involved, either personally or by certified mail, return receipt requested. The judge shall file a written answer to the complaint with the commission within twenty days of such service. If, upon receipt of the answer, or upon expiration of the time to answer, the commission shall direct that a hearing be held with respect to the complaint, the judge involved shall be notified in writing of the date of the hearing either personally, at least twenty days prior thereto, or by certified mail, return receipt requested, at least twenty-two days prior thereto. Upon the written request of the judge, the commission shall, at least five days prior to the hearing or any adjourned date thereof, make available to the judge without cost copies of all

documents which the commission intends to present at such hearing and any written statements made by witnesses who will be called to give testimony by the commission. The commission shall, in any case, make available to the judge at least five days prior to the hearing or any adjourned date thereof any exculpatory evidentiary data and material relevant to the complaint. The failure of the commission to timely furnish any documents, statements and/or exculpatory evidentiary data and material provided for herein shall not affect the validity of any proceedings before the commission provided that such failure is not substantially prejudicial to the judge. The complainant may be notified of the hearing and unless he shall be subpoenaed as a witness by the judge, his presence thereat shall be within the discretion of the commission. The hearing shall not be public unless the judge involved shall so demand in writing. At the hearing the commission may take the testimony of witnesses and receive evidentiary data and material relevant to the complaint. The judge shall have the right to be represented by counsel during any and all stages of the hearing and shall have the right to call and cross-examine witnesses and present evidentiary data and material relevant to the complaint. A transcript of the proceedings and of the testimony of witnesses at the hearing shall be taken and kept with the records of the commission.

New York Judiciary Law Section

44(7) states:

After a hearing, the commission may determine that a judge be admonished, censured, removed or retired. The commission shall transmit its written determination, together with its findings of fact and conclusions of law and the record of the proceedings upon which its determination is based, to the chief judge of the court of appeals who shall cause a copy thereof to be served either personally or by certified mail, return receipt requested, on the judge involved. Upon completion of service, the determination of the commission, its findings and conclusions and the record of its proceedings shall be made public and shall be made available for public inspection at the principal office of the commission and at the office of the clerk of the court of appeals. The judge involved may either accept the determination of the commission or make written request to the chief judge, within thirty days after receipt of such determination, for a review thereof by the court of appeals. If the commission has determined that a judge be admonished or censured, and if the judge accepts such determination or fails to request a review thereof by the court of appeals, the commission shall thereupon admonish or censure him in accordance with its findings. If the commission has determined that a judge be removed or retired, and if the judge accepts such determination or fails to request a review thereof by the court of appeals, the court of appeals shall thereupon order his removal or retirement in accordance with the findings of the commission.

New York Judiciary Law Section

44(9) states:

In its review of a determination of the commission, the court of appeals shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based. After such review, the court may accept or reject the determined sanction; impose a different sanction including admonition, censure, removal or retirement for the reasons set forth in subdivision one of this section; or impose no sanction.

Question Presented

Where petitioner was removed from judicial office by the New York State Court of Appeals upon stated charges, did it violate his right to due process for the Court to have commented in its opinion on material in the record relevant to but not precisely verbalized in the charges?

Statement of the Case

The background of this case is substantially set forth in the opinion of the Court of Appeals in Matter of Gelfand v. State Commission on Judicial Conduct, 70 NY2d 211 (1987) and in the determination of the Commission in Matter of Gelfand, unreported -- both of which are reproduced in the appendix to the petition (Pet. App. 6-46).

Petitioner was the Surrogate of Bronx County, New York. Pursuant to Judiciary Law Section 44(4), he was served with a Formal Written Complaint in June 1986 alleging various acts of misconduct (Pet. App. 1-5), and a hearing was held thereupon. Pursuant to Judiciary Law Section 44(7), the Commission thereafter determined that petitioner should be removed from judicial office. In its subsequent review of the

Commission's determination and the record of the proceedings upon which it was based, the Court of Appeals, pursuant to Article 6, Section 22(d), of the State Constitution and Judiciary Law Section 44(9), removed petitioner from office, in a reported opinion. Matter of Gelfand v. State Commission on Judicial Conduct, 70 NY2d 211 (1987).

It is petitioner's apparent contention that, by commenting in its opinion on matters purportedly outside the scope of the stated charges, the Court of Appeals denied him his right to due process and equal protection of the law.

ARGUMENT

- I. The Petition Fails To Demonstrate That Petitioner's Due Process Rights Were Violated, In That Petitioner Had Clear And Ample Notice Of The Charges Against Him And Was Removed From Office On Those Charges
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It is readily apparent that neither the Court of Appeals nor the Commission violated any right afforded to petitioner under the Constitution or laws of the United States, or the Constitution or laws of the State of New York.

Petitioner was duly served with stated charges of misconduct in office (Pet. App. 1-5). A hearing and other proceedings were held on those charges (Pet. App. 6-7). The Commission determined on the record of those proceedings -- including petitioner's "repeated lack of candor" on the witness stand -- that petitioner should be removed from office (Pet. App. 6-28). The Court of Appeals,

upon review of the entire record, thereafter accepted the Commission's determination and removed petitioner from his judicial office, concluding specifically that the stated charges which gave rise to the proceedings were sustained and constituted cause for petitioner's removal (Pet. App. 45).

The petition seems to argue that petitioner's due process rights were violated because the Court of Appeals, in its removal opinion, did not repeat precisely the language set forth in the charges against him.<sup>2</sup> As such,

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<sup>2</sup>Nowhere is this more evident than when petitioner accuses the Court of exceeding the charges by finding that he made "threats" against court officials and others out of "personal vengeance" against a female law assistant who had ended their "sexual relationship" (Pet. 17-18). The Formal Written Complaint charges petitioner, inter alia, with telling the law assistant she was "off the payroll" based (Footnote Continued)

petitioner totally misapprehends the purpose of an accusatory instrument.

Due process requires that a person be given adequate notice and opportunity to be heard before the government deprives him of his liberty or property. Cleveland Board of Education v. Loudermill, 470 US 532, 541 (1985); Memphis Light, Gas & Water Division v. Craft, 436 US 1 (1978). Moreover, due process demands that "notice [be] of such nature as reasonably to convey the required information..." Mullane v.

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(Footnote Continued)  
on "personal reasons" in connection with their "personal relationship"; then acting out of "personal animus" to prevent her future employment in the courts; then having "threatened" to speak to the lawyer-parents of her new boyfriend, whose mother was an employee of petitioner's court; and then meeting with and indicating to her new employer his "displeasure" at her having been employed (Pet. App. 2-4). The Court's language, while not mimicry, is utterly consistent with the charges.

Central Hanover Bank & Trust Co., 399 US 306, 313-14 (1950). In the instant proceeding, petitioner received clear, adequate and actual notice and opportunity to be heard on the charges against him (Pet. App. 1-5).

The Formal Written Complaint charged petitioner with a course of misconduct relative to his telling his female law assistant in August 1985 -- in connection with their personal relationship and unrelated to her official duties -- that she was "off the payroll" as a court employee. In addition, the Complaint charged petitioner with removing the law assistant's personal effects from her office on August 3rd and delivering them in boxes to her home, for personal reasons unrelated to her official duties; leaving obscene, annoying and otherwise offensive messages on her telephone answering machine over a six-and-a-half

week period; falsely identifying himself to a building doorman as his law assistant's attorney; confronting the law assistant's new male friend about their relationship and threatening to speak to the friend's employer (the District Attorney) about his conduct; leaving offensive messages on the friend's telephone answering machine and threatening to speak to the friend's parents in his efforts to reach the law assistant; requesting, because of personal animus toward the law assistant, that the Deputy Chief Administrative Judge view unfavorably her applications for future employment in the courts; and thereafter meeting with the law assistant's new employers and indicating his displeasure at their having employed her as an associate in their law firm.

The Formal Written Complaint also enumerated the specific sections of

the Rules Governing Judicial Conduct which petitioner was charged with having violated.

These detailed charges gave petitioner clear and actual notice of the complaint against him and as such met this Court's notice requirement as set forth in Loudermill, Memphis Light and Mullane, supra.

At the hearing, the referee properly "allowed relevant evidence of events predating the alleged misconduct in order to clarify or provide background for the formal charges" (Pet. App. 44). It is, of course, axiomatic that evidence relevant to stated charges may be adduced at trial without compromising due process.

The Court of Appeals in its opinion commented upon relevant matters properly adduced into the evidentiary record before the referee. Petitioner

now avers that such commentary violated his due process rights in that they exceeded the scope of the charges and he was without notice to defend against them. Ironically, as the record of the proceedings and the briefs to the Court of Appeals unequivocally demonstrate, most of the material which petitioner now asserts was outside the scope of the charges was, in fact, introduced into the record by petitioner himself!

The Court explicitly limited itself to removing petitioner on the basis of the conduct specifically set forth in the charges against him, noting "that the acts that were described in the formal complaint and proven at the hearing constitute sufficient cause for removal" (Pet. App. 45). Indeed, a simple reading of the charges (Pet. App. 1-5) and the Court's opinion (Pet. App. 37-46) demonstrates the consistency

between what was charged and what was found. Thus, the Court of Appeals met this Court's due process standard in In re Ruffalo, 390 US 544 (1968) -- petitioner was disciplined for what he was charged with; he was not charged with one type of misconduct and removed from office for another. It was entirely appropriate for the Court of Appeals to make reference in its opinion to material deemed relevant to the charges and otherwise properly in the record of proceedings before it.

#### CONCLUSION

Petitioner has not demonstrated that he was deprived of a constitutional right to due process by the New York State Commission on Judicial Conduct or the New York State Court of Appeals.

For the reasons stated above,  
respondent prays that the Petition for a  
Writ of Certiorari be denied.

Respectfully submitted,

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Dated: New York, New York  
November 12, 1987

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